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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

OSCAR GONZALEZ CHIRINO,

Defendant and Appellant.

B205451

(Los Angeles County
Super. Ct. No. GA043812)

APPEAL from an order of the Superior Court of Los Angeles County,
Steven K. Lubell, Judge. Affirmed.

Law Offices of Brian D. Lerner, Brian D. Lerner and Christopher A. Reed
for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H.
Borjon and John R. Gorey, Deputy Attorneys General, for Plaintiff and
Respondent.

Oscar Gonzalez Chirino appeals the denial of a motion to set aside a plea of no contest to possession for sale of a controlled substance on the ground he was not properly advised of the immigration consequences of his plea. We affirm the trial court's denial of the motion.

BACKGROUND

On November 2, 2000, Chirino pleaded no contest to a violation of Health and Safety Code section 11378, possession for sale of a controlled substance. Before Chirino entered his plea, he was advised, "If you are not a citizen of the United States, your plea here today could cause you to be deported, denied reentry, denied naturalization or denied amnesty. Do you understand this?" Chirino responded he did. The trial court placed Chirino on probation for three years on condition he spend the first 120 days in county jail.

On November 1, 2006, Chirino filed a motion to vacate the no contest plea. Chirino claimed the advisements required by Penal Code section 1016.5 did not precede entry of the plea.¹ The motion asserted Chirino is a 37-year-old citizen of Mexico who has been a lawful permanent resident of the United States since 1973. He married Patricia Rosales in Anaheim in October of 1990, and they have two children.

The trial court found Chirino had been given the advisements required by section 1016.5 and denied the motion.

¹ Subsequent unspecified statutory references are to the Penal Code.

Section 1016.5, subdivision (a), requires that, prior to acceptance of a plea of nolo contendere to any offense punishable as a crime under state law, the trial court "shall administer the following advisement on the record to the defendant: If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

CONTENTIONS

Chirino contends his plea was not knowing and voluntary, the advisements required by section 1016.5 did not reflect the true immigration consequences of the no contest plea and vacating Chirino's conviction will serve the interests of justice.

DISCUSSION

1. *Governing principles.*

A defendant's right to an advisement about immigration consequences is statutory, not constitutional. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 194 (*Zamudio*).) The underlying purpose of section 1016.5 is to ensure the defendant has actual knowledge of the possible adverse immigration consequences of a guilty or no contest plea and has had an opportunity to make an intelligent choice to plead guilty or no contest. (*Id.* at pp. 193-194; *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 173.)

“ ‘To prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement. [Citations.]’ ” (*People v. Castro-Vasquez* (2007) 148 Cal.App.4th 1240, 1244.) We review the denial of a motion to vacate under section 1016.5 for abuse of discretion. (*Zamudio, supra*, 23 Cal.4th at p. 192.)

2. *Chirino's arguments.*

On appeal, Chirino admits he was advised of the immigration consequences as required by section 1016.5. Chirino asserts that, despite these advisements, he did not understand the immigration consequences of his plea and, had he understood, he would have sought a different plea bargain or would have taken the

case to trial. Chirino asserts he pleaded no contest to an offense that constitutes an “aggravated felony” under federal immigration laws.² Thus, he was subject to each of the three immigration consequences mentioned in the section 1016.5 advisements. He claims the use of the word “may” and “or” lead a defendant to believe a plea of no contest might subject the defendant to one of these consequences. However, an individual convicted of an aggravated felony is subject to all three. Chirino concludes advisements under section 1016.5 misrepresent the actual immigration consequences of a no contest plea.

Chirino contends the advisements may have been adequate when section 1016.5 was enacted in 1978. However, the definition of an aggravated felony was dramatically broadened by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Chirino concludes the advisements currently are inadequate, misleading and therefore unconstitutional.

3. *Chirino fails to demonstrate his plea was not knowing and voluntary.*

The advisement given adequately warned Chirino of the multiple immigration consequences that might result from the no contest plea. (*People v. Valenciano* (1985) 165 Cal.App.3d 604, 606.) Section 1016.5 does not require the trial court to tailor the advisement to the defendant’s circumstances or ensure that the defendant understands the intricacies of immigration law as it applies to the defendant. Thus, case law establishes that a defendant need not be advised of remedies available to avoid deportation (*People v. Barocio* (1989) 216 Cal.App.3d 99, 105) or the possibility of other immigration consequences of a plea

² Possession for sale of a controlled substance constitutes an aggravated felony for immigration purposes. (8 U.S.C. § 1101(a)(43)(B).) An individual who has been convicted of an aggravated felony is conclusively presumed to be deportable (8 U.S.C. § 1228(c)), is subject to immediate deportation (8 U.S.C. § 1227(a)(2)(A)(iii)), is permanently inadmissible to the United States (8 U.S.C. § 1182(a)(9)(A)(i)), and is permanently barred from establishing good moral character for naturalization purposes (8 U.S.C. §§ 1101(f)(8)).

(*People v. Gutierrez, supra*, 106 Cal.App.4th at p. 174, fn. 4). The statute requires the advisement regardless of whether it applies to the defendant before the court and the defendant is not required to disclose his or her legal status. (§ 1016.5, subd. (d).) By enacting section 1016.5, the Legislature simply intended that noncitizen defendants be made aware of the possible immigration consequences they might face as a result of entering a plea of guilty or nolo contendere.

With respect to Chirino's claim the advisements required by section 1016.5 are outdated, we note that "Congress first made commission of an aggravated felony grounds for an alien's removal in 1988, and it defined the term to include offenses such as murder, drug trafficking crimes, and firearm trafficking offenses. See Anti-Drug Abuse Act of 1988, §§ 7342, 7344, 102 Stat. 4469, 4470." (*Leocal v. Ashcroft* (2004) 543 U.S. 1, 4, fn. 1 [160 L.Ed.2d 271].)

Thus, at the time of Chirino's plea in this case in 2000, the requirement that individuals convicted of an aggravated felony be subject to removal had been the rule for 12 years. Even if the removal of such felons had been a recent development, Chirino's contention amounts to an assertion the trial court is obliged to tailor the advisements to the defendant's specific situation. As noted, the statute does not impose this responsibility on the trial court.

We therefore conclude the trial court did not abuse its discretion in denying Chirino's motion to vacate the plea.

DISPOSITION

The order denying the motion to vacate the no contest plea is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.